

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DEL and CHERIE IRISH,)	
individually, and as a marital)	NO. CV-05-134-LRS
community; and as guardian ad)	
litem of JANE DOE IRISH, a)	ORDER
minor,)	
)	
Plaintiff,)	
)	
-vs-)	
)	
WHITMAN COUNTY, a quasi-)	
municipal corporation,)	
)	
Defendant.)	
)	

Before the Court is the Defendant Whitman County's Motion Re: FRCP
26 Production of Documents and Plaintiffs' Requests for Production (Ct.
Rec. 15), filed November 8, 2005. Defendant requested a hearing date of
December 5, 2005, without oral argument. Plaintiffs have not filed a
written response to the instant motion.

I. BACKGROUND

This matter arises from a complaint for negligence and violation of
federally-protected civil rights. Plaintiffs allege that Howard Banks,
a forty-year old former employee of Whitman County, had unlawful physical
contact with Plaintiff Jane Doe Irish, including sexual intercourse.
Complaint, ¶2.1. Plaintiffs further allege that Mr. Banks used/misused
his authority and position as a law enforcement (corrections) officer to

1 accomplish the unlawful acts complained of. Id., ¶¶2.3, 2.5.

2 Defendant request an order from the Court allowing Whitman County
3 to produce the personnel file of Howard Banks as requested by Plaintiffs.
4 Defense counsel represents that Plaintiffs have requested Mr. Banks'
5 personnel file, including: 1) copies of any testing or examinations
6 conducted, including polygraph testing, Minnesota Multiphasic Personality
7 Inventory testing, psychological fitness testing, educational or aptitude
8 testing; and 2) copies of any Personal History Statements filled out by
9 Mr. Banks including, but not limited to, his application for employment
10 for the job of corrections officer in the Whitman County Jail for which
11 he was hired. Ct. Rec. 16, at 2.

12 Because the requested documents contained potentially private and/or
13 confidential information regarding Mr. Banks, defense counsel sent a
14 letter to him on October 5, 2005. Id. On October 31, 2005, Mr. Banks
15 sent a letter back to defense counsel indicating he did object to the
16 production of his personnel file. Ct. Rec. 16, Exh. B.

17 Defendant Whitman County does not object to the production of the
18 documents requested by Plaintiffs. However, given Mr. Banks' objection,
19 defense counsel believes it is appropriate to produce the documents
20 pursuant to a court order. Ct. Rec. 16, at 3. Further, defense counsel
21 relates that the Plaintiffs have indicated they have no objection to
22 production subject to a protective order. Id.

23 **II. DISCUSSION**

24 Pursuant to Fed.R.Civ.P. 26(b)(1), parties to an action are entitled
25 to liberal discovery regarding "any matter, not privileged, which is
26 relevant to the subject matter involved in the pending action. . ." Id.

1 At the discovery stage, parties are not limited to admissible evidence.
2 "A discovery request is generally unobjectionable 'if the information
3 sought appears reasonably calculated to lead to the discovery of
4 admissible evidence.' " *Marshall v. Bramer*, 828 F.2d 355, 358 (6th
5 Cir.1987). Full discovery is particularly warranted where a case is based
6 on federally-protected civil rights. See, e.g., *Irwin v. Airco Carbide*,
7 837 F.2d 724, 726 (6th Cir.1987); *Griffith v. Wal-Mart Stores, Inc.*, 163
8 F.R.D. 4, 5 (E.D.Ky.1995). Rule 26 further provides that upon a showing
9 of good cause, the court may order discovery of any matter relevant to
10 the subject matter involved in the action.

11 The Supreme Court has held that questions of evidentiary privilege
12 arising in the course of the adjudication of federal rights are governed
13 by the principles of federal common law. *United States v. Zolin*, 491 U.S.
14 554, 109 S.Ct. 2619, 2625, 105 L.Ed.2d 469 (1989), citing Rule 501 of the
15 Federal Rules of Evidence. In a federal civil rights action, federal law
16 controls what evidence is privileged and discoverable. Fed.R.Evid. 501;
17 *Horizon of Hope; Ministry v. Clark County, Ohio*, 115 F.R.D. 1, 4
18 (S.D.Ohio 1986). It also is well settled in other circuits that under
19 federal law there exists no general privilege for personnel files, even
20 those of law enforcement officers. See, e.g., *Coughlin v. Lee*, 946 F.2d
21 1152, 1159 (5th Cir.1991) (allowing discovery of records of police
22 officer background check); *Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th
23 Cir.1980) (allowing discovery of EEOC personnel files); *Griffith v.*
24 *Wal-Mart Stores, Inc.*, 163 F.R.D. 4 (E.D.Ky.1995) (managerial personnel
25 files properly discoverable); *Horizon of Hope*, 115 F.R.D. at 6 (police
26 officer personnel files discoverable); *Spell v. McDaniel*, 591 F.Supp.

1 1090, 1119 (E.D.N.C.1984).

2 The Ninth Circuit considers government personnel files "official
3 information." "Federal common law recognizes a qualified privilege for
4 official information. (citation omitted). Government personnel files are
5 considered official information." *Sanchez v. City of Santa Ana*, 936 F.2d
6 1027, 1033 (9th Cir.1990). In order to determine whether personnel files
7 sought are privileged, courts must weigh potential benefits of disclosure
8 against potential disadvantages; if the latter is greater, the official
9 information privilege may bar discovery. *Id.* at 1033-34. Such balancing
10 should be conducted on a case by case basis, determining what weight each
11 relevant consideration deserves in the fact-specific situation that is
12 before the Court. *Kelly v. City of San Jose*, 114 F.R.D. 653, 663
13 (N.D.Cal.1987).¹

14 This balancing test has been moderately pre-weighted in favor of
15 disclosure: Such pre-weighting is consistent with the well-established
16 notion that because privileges operate in derogation of the truth finding
17 process the law places the burden of proving all elements essential to
18 invoking any privilege on the party seeking its benefits. The
19 pre-weighting also is consistent with the related idea that privileges
20 generally are to be narrowly construed, and that doubts about their
21 applicability are to be resolved in favor of disclosure. *Kelly*, 114
22 F.R.D. at 662.

23 There is no dispute that Mr. Banks, who is not a party to this suit,
24 has not provided written consent for the disclosure of his personnel

25
26 ¹Kelly lists factors to be considered in balancing the plaintiff's
interest in disclosure against the government's interest in
confidentiality.

1 file. Although discovery standards under the Federal Rules of Civil
2 Procedure permit access to relevant documents protected by the Privacy
3 Act, 5 U.S.C. §552, those same standards give the district court ample
4 discretion to fashion appropriate protective orders upon a showing of
5 "good cause." Fed.R.Civ.P. 26(c).

6 In light of the allegations in the Complaint, the Court finds that
7 Mr. Banks' personnel file may contain relevant information regarding this
8 case. In a federal civil rights action, federal law applies to the
9 determination of what evidence is privileged and discoverable. The Court
10 must conclude that the personnel file at issue is discoverable.

11 Mr. Banks is not a party to this lawsuit, is no longer an employee
12 of Defendant, and not the person from whom discovery is sought.
13 Defendant desires to produce the file and is not asserting any government
14 interest in confidentiality other than generally recognizing that the
15 requested documents may contain potentially private and/or confidential
16 information. The Court finds that there are potentially legitimate
17 privacy and confidentiality concerns which are not sufficient to prevent
18 discovery and can be accommodated with appropriate redaction procedures.
19 Accordingly,

20 **IT IS ORDERED, ADJUDGED AND DECREED:**

21 1. Defendant's Motion Re: FRCP 26 Production of Documents and
22 Plaintiffs' Requests for Production, Ct. Rec. 15, filed November 8, 2005,
23 is **GRANTED**.

24 2. The documents included in Mr. Banks' personnel file shall be
25 redacted to exclude social security numbers, and bank account and asset
26 information, if any, contained in the records before they are provided

1 to counsel. Further, all nonpublic personnel records and information
2 produced pursuant to this order shall be used solely for purposes of this
3 litigation and shall not otherwise be disclosed, disseminated, or
4 reproduced.

5 3. Counsel for defendant shall provide a copy of this Order to Mr.
6 Banks.

7 **IT IS SO ORDERED.** The District Court Executive is directed to file
8 this Order and provide copies to counsel.

9 **DATED** this 9th day of December, 2005.

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11 S/Lonny R. Suko

12 LONNY R. SUKO
13 UNITED STATES DISTRICT JUDGE
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